

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ORIN SAFIER, on behalf of	)	
himself and those similarly	)	
situated	)	No. C05-3353 BZ
	)	
Plaintiff(s),	)	<b>ORDER AWARDING FEES AND</b>
	)	<b>COSTS</b>
v.	)	
	)	
WESTERN DIGITAL CORPORATION,	)	
	)	
Defendant(s).	)	
_____	)	

Before the court is class counsel's motion for attorneys' fees in the amount of \$485,000 and costs in the amount of \$10,190. For the reasons set forth below, I find that class counsel's efforts on behalf of the settlement do not merit the full amount of fees they claim and award them \$231,360.

On March 22, 2005, Orin Safier ("class plaintiff"), a current New Mexico resident and former California resident, and Michael Lazar, a California resident, brought an action in San Francisco Superior Court of California against defendants Seagate Technology LLC and Western Digital Corporation ("defendant" or "Western Digital"). The complaint alleged

1 that Western Digital, which sells hard drives in the  
2 replacement market, overstated the memory capacity of its  
3 products by approximately 7%, because defendant computes 1  
4 gigabyte under the decimal definition of 1,000,000,000 bytes,  
5 instead of the binary definition of 1,073,741,824 bytes, which  
6 plaintiff claims should apply. After the state court  
7 sustained a demurrer to the complaint based on misjoinder,  
8 plaintiffs dismissed Western Digital. On July 7, 2005, Orin  
9 Safier only filed a new state action against Western Digital  
10 only, which defendant removed to this court. The original  
11 action, Lazar v. Seagate Technology LLC, continued in San  
12 Francisco Superior Court.

13 On February 1, 2006, Safier moved for preliminary  
14 approval of a class settlement, which defendant supported.  
15 The proposed settlement terms included certification of a  
16 national class estimated to encompass about 1 million people  
17 and an agreement by defendant to state its definition of a  
18 gigabyte on its product packaging and to provide each class  
19 member who successfully completes a claim form with the  
20 opportunity to download a piece of backup and recovery  
21 software. In return, the class agreed to dismiss this lawsuit  
22 with prejudice and the class and others agreed to give  
23 defendant a very broad general release of all claims,  
24 including a waiver of the protection offered under California  
25 Civil Code § 1542.

26 I held a preliminary approval hearing on February 15,  
27 2006 during which I voiced a number of concerns about the  
28 settlement, which are contained in the record of that hearing,

1 and announced that I was not prepared to give preliminary  
2 approval to the settlement in its then form. One of my major  
3 concerns was that the benefit to defendant from obtaining a  
4 release of all claims from the class and from other defined  
5 persons, not limited to the release of the claim which was the  
6 subject of the litigation,<sup>1</sup> outweighed the primary benefit  
7 that the class received, a \$30 piece of software, which I  
8 suspected many class members with the sophistication to be  
9 able to replace a hard drive would already own.

10 Following that hearing, the parties re-negotiated some of  
11 the terms of settlement. On March 8, 2006 the parties  
12 submitted an Amended and Restated Settlement Agreement (the  
13 "settlement agreement") which addressed many of the court's  
14 concerns. Significantly, it scaled back the scope of the  
15 release so that only claims that would have been barred by the  
16 res judicata effect of any judgment that defendant could have  
17 obtained were released and it eliminated non-class members.  
18 On March 17, 2006 I preliminarily approved the class  
19 settlement and ordered that notice be given. I scheduled a  
20 final approval hearing for June 14, 2006.<sup>2</sup> On June 15, 2006,

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21  
22 <sup>1</sup> The original settlement released defendant from any  
23 claims "which are alleged or could have been alleged in the  
24 Litigation." Safier Decl. in Supp. of Prelim. Appr., Exh. A  
25 Class Action Settlement Agreement § 10.1. Arguably, this could  
26 have, for example, precluded claims based on defective hard  
27 drives.

28 <sup>2</sup> At the final approval hearing, I also expressed a  
concern about the inclusion in the proposed final judgment  
submitted by class counsel, of an injunction against  
prosecution of future claims, which created a risk of contempt  
even for class members who had not received actual notice. I  
altered the judgment to eliminate this risk.

1 I entered final judgment approving the settlement.

2 Class counsel have moved for attorneys' fees in the  
3 amount of \$485,000 and costs in the amount of \$10,190. The  
4 settlement agreement provides that defendant will pay  
5 plaintiff's counsel attorneys' fees up to \$485,000 and  
6 expenses up to \$15,000, subject to court approval. Class  
7 counsel justify their fees using the lodestar method.

8 Where, as here, the class settlement has not created a  
9 common fund out of which fees are to be paid, the preferable  
10 method for determining a reasonable fee to class counsel is  
11 the lodestar method. Hanlon v. Chrysler Corp., 150 F.3d 1011,  
12 1029 (9th Cir. 1998)(in class action cases involving  
13 injunctive relief, "courts often use a lodestar calculation  
14 because there is no way to gauge the net value of the  
15 settlement or any percentage thereof"). The lodestar  
16 calculation begins with the multiplication of the number of  
17 hours reasonably expended by a reasonable hourly rate. The  
18 resulting figure may be adjusted upward or downward to account  
19 for several factors, including (1) the time and labor  
20 required, (2) the novelty and difficulty of the issues  
21 involved, (3) the skill required to perform the legal services  
22 properly, (4) the preclusion of employment by class counsel  
23 due to the acceptance of this case, (5) the customary fees,  
24 (6) the amount involved and the results or benefit obtained  
25 for the class, (7) the experience, reputation and availability  
26 of class counsel, (8) the undesirability of the case and (9)  
27 the nature and length of the professional relationship with  
28 class plaintiff and class members. Gates v. Deukmejian, 987

1 F.2d 1392, 1402 n.12 (9th Cir. 1992); Ferland v. Conrad Credit  
2 Corp., 244 F.3d 1145, 1148-49 (9th Cir. 2001). See also  
3 Hanlon, 150 F.3d at 1029 (listing as factors the quality of  
4 the representation, the benefit obtained for the class, the  
5 complexity and novelty of the issues presented and the risk of  
6 non-payment).

7 The first obstacle to applying the lodestar approach is  
8 that class counsel have failed to properly document their  
9 work. Attorneys should support the hours expended and the  
10 rate by adequate documentation and other evidence. Hanlon,  
11 150 F.3d at 1029. Class counsel's failure to do so in this  
12 case precludes the court from making an independent  
13 determination of such issues as whether the hours claimed were  
14 reasonable and whether they were for work done on this case,  
15 as opposed to work done on the companion case, Lazar v.  
16 Seagate Technology LLC, or work done in state court which  
17 might not be fully compensable in federal court.<sup>3</sup> At the same  
18 time, the total of 512 hours claimed by the two attorneys does  
19 not seem out of line. Class counsel are to be credited for  
20 working towards an early resolution of the case. Accordingly,  
21 I am prepared to calculate fees based on class counsel's claim  
22 that they spent 512 hours on this case.

23 The claimed hourly rates, \$450 for Mr. Gutride and \$425  
24 for Mr. Safier, are likewise thinly supported. For example,

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26 <sup>3</sup> In their memorandum, class counsel have also included  
27 drafting and negotiating a protective order and case management  
28 conference statements in their list of tasks performed for this  
case, but there is no protective order and no case management  
conferences occurred in this case.

1 there is little evidence, other than Mr. Safier's assertion,  
2 that those rates are consistent with hourly rates charged by  
3 attorneys of similar experience. Faced with such thin  
4 support, a court is permitted to use its knowledge of  
5 prevailing rates to help calculate the hourly rate.

6 Defenbaugh v. JBC & Associates, Inc., 2004 WL 1874978, at \* 7  
7 (N.D. Cal. Aug. 10, 2004); Feuerstein v. Burns, 569 F.Supp.  
8 268, 275 (S.D. Cal. 1983). Based on my knowledge of rates  
9 generally and of rates I have awarded in other attorneys' fees  
10 requests, and my observations of the quality of their work in  
11 protecting the class, I conclude that an appropriate rate for  
12 Mr. Gutride is \$400 an hour and an appropriate rate for Mr.  
13 Safier is \$350 an hour. In re HPL Tech., Inc. Sec. Lit., 366  
14 F.Supp.2d 912, 921-22 (N.D. Cal. 2005)(adjusting the Laffey  
15 hourly rates matrix on the Department of Justice's website to  
16 take into account the higher cost of living in the San  
17 Francisco Bay Area and concluding that a reasonable rate for  
18 attorneys with similar years of experience is \$305 per hour).  
19 See also Defenbaugh, 2004 WL 1874978, at \* 7 (finding rates of  
20 \$435 and \$400 for attorneys with 20-plus years of experience  
21 to be reasonable in 2004).

22 Accepting counsel's claimed hours and applying these  
23 rates produces a lodestar calculation for Mr. Gutride of  
24 \$108,800 (272 hours x \$400 per hour) and for Mr. Safier of  
25 \$84,000 (240 hours x \$350 per hour) for a total lodestar of  
26 \$192,800.

27 I have also concluded that class counsel are not entitled  
28 to the 2.16 multiplier they seek. Many of the factors used to

1 justify a substantial multiplier are not present here. The  
2 issues involved were not especially novel or difficult. Class  
3 counsel have made little showing that other employment was  
4 precluded as a result of this case or that this was an  
5 undesirable case that other counsel would have shunned. The  
6 nature of their relationship with class plaintiff also does  
7 not favor a multiplier. Class plaintiff is the uncle of one  
8 of the attorneys, Seth Safier, and he is also a resident of  
9 New Mexico. If anything, Orin Safier's role as class  
10 plaintiff introduced unnecessary questions about the propriety  
11 and adequacy of a New Mexico resident representing a class  
12 asserting California claims.

13 An overriding factor in determining the multiplier is the  
14 result that class counsel achieved and the benefit they  
15 conferred on the class. As noted above, the settlement that  
16 class counsel negotiated and presented at first produced a  
17 class benefit which was outweighed by the benefit defendant  
18 would have received from the broad form of release to which  
19 class counsel had agreed. As re-negotiated following the  
20 court's initial inclination not to approve the settlement, the  
21 benefit is fair and adequate for the narrow release defendant  
22 received. Defendant has maintained from the outset that  
23 defining a gigabyte decimally is consistent with the industry  
24 standard. Defendant has not agreed to expand its capacity to  
25 the binary standard but only to clarify that it uses the  
26 decimal standard. Given the reality of how large a hard drive  
27 is, it does not appear to the court that many class members  
28 would fill their hard drives to capacity such that they would

1 have been harmed by the claimed 7% disparity. This is  
2 consistent with some of the comments the court received from  
3 class members who objected or sought exclusion.

4 Nonetheless, many thousands of class members will be  
5 downloading something that they perceive as being of some  
6 benefit to them and defendant's disclosure of how it  
7 calculates capacity will certainly clarify its practice.  
8 Since class counsel took this matter on a contingency basis,  
9 in the sense that they had no expectation of any fee if  
10 plaintiffs did not prevail, I conclude that a multiplier of  
11 1.2 is appropriate. This produces a total fee of \$231,360.<sup>4</sup>  
12 Fischel v. Equitable Life Assur. Society of U.S., 307 F.3d  
13 997, 1008 (9th Cir. 2002) ("A district court generally has  
14 discretion to apply a multiplier to the attorney's fees  
15 calculation to compensate for the risk of nonpayment.")  
16 (citation omitted). Such a multiplier is also supported by  
17 class counsel's declaration that they have responded to a  
18 number of inquiries from class members and will continue to  
19 expend time and effort in implementing and monitoring the  
20 settlement. Hanlon, 150 F.3d at 1029 (affirming fee award  
21 because it "includes all future services that class counsel  
22 must provide").

23 Finally, a cross-check of an attorneys' fees award of  
24 \$231,360 using the percentage of recovery method establishes  
25 its reasonableness. The benchmark in the Ninth Circuit is

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27 <sup>4</sup> Class counsel discuss the risks they bore in  
28 "contribut[ing] substantial time and advanc[ing] significant  
costs . . . with no guarantee of compensation or recovery,  
against a well-funded defense." Safier Decl. ¶ 26.



1 25%. Class counsel contend that because the class is  
2 estimated to have one million class members, each of whom is  
3 eligible to receive software with a retail value of \$30, the  
4 recovery totals \$30 million. However, the better approach is  
5 to focus on the benefits actually conferred on the class as  
6 opposed to the benefits that may be hypothetically conferred  
7 if all class members participated in the settlement. See  
8 cautions noted in Manual for Complex Litigation (Fourth)  
9 § 21.71 (2004) and in Managing Class Action Litigation: A  
10 Pocket Guide for Judges § IV.C (2005). See also Staton v.  
11 Boeing Co., 327 F.3d 938, 973-74 (9th Cir. 2003)(to ensure fee  
12 is shifted to those actually benefitting, when value of relief  
13 is difficult to quantify, "courts should consider the value of  
14 the injunctive relief obtained as a 'relevant circumstance' in  
15 determining what percentage of the common fund class counsel  
16 should receive as attorneys' fees, rather than as part of the  
17 fund itself"). Defendant submitted a declaration that as of  
18 June 30, 2006, Western Digital had received a total of 32,315  
19 claim forms. Flynn Decl. re Claim Forms ¶ 3. If all 32,315  
20 class members were to receive a \$30 benefit, then the value of  
21 the benefit would total \$969,450, and an award of attorneys'  
22 fees of \$485,000 would equal approximately 50% of the value.  
23 An award of \$231,360 equals roughly 24% of the value, which is  
24 close to the 25% benchmark, an indication that the reduced  
25 attorneys' fee award is reasonable.<sup>5</sup>

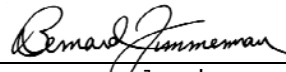
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26  
27 <sup>5</sup> While the period for filing claims remains open through  
28 next week, I do not expect additional claims to materially  
alter this analysis, since most class members would have  
submitted claims soon after they received notice to file, which

1 The court will award the requested amount of \$10,190 for  
 2 costs, which include typical and reasonable copying, postage,  
 3 filing and mediation fees. The court will also award class  
 4 plaintiff an incentive of \$1,000 as requested. Van Vranken v.  
 5 Atlantic Richfield Co., 901 F.Supp. 294, 299 (N.D. Cal.  
 6 1995)(granting reimbursement of expenses and an incentive  
 7 award to the named class representative). In his March 8,  
 8 2006 declaration, class plaintiff stated that he had "reviewed  
 9 some court filings and and [sic] other documents, and [he]  
 10 participated in the settlement process." Orin Safier Decl. ¶  
 11 5. He also "incurred the risk of an adverse judgment," which  
 12 could have resulted in an award of costs to defendant. Id.  
 13 Together with the size of the requested incentive award, the  
 14 declaration is sufficient to support granting \$1,000 to class  
 15 plaintiff.

16 For the reasons stated above, **IT IS HEREBY ORDERED** that  
 17 class counsel's motion for attorneys' fees and costs is  
 18 **GRANTED in part** and **DENIED in part**. Class counsel is awarded  
 19 attorneys' fees of \$231,360 and costs of \$10,190. **IT IS**  
 20 **FURTHER ORDERED** that the request for an incentive award of  
 21 \$1,000 for class plaintiff Orin Safier is **GRANTED**. Defendant  
 22 is **FURTHER ORDERED** to publish a copy of this Order on its  
 23 website with the other settlement documents.

24 Dated: July 5, 2006

25 

26 Bernard Zimmerman  
 27 United States Magistrate Judge

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was given within five days after June 15, 2006.